

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF APPLICATION FOR)
CHANGE OF APPROPRIATION WATER RIGHT NO.) FINAL ORDER
26325-c411 BY JOHN H. & JANICE M. HUNTER)
* * * * *

The Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order as entered by the Hearing Examiner on December 11, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

RESPONSE TO OBJECTIONS TO THE PROPOSAL FOR DECISION

Two objections to the Hearing Examiner's Proposal for Decision were filed by Mr. Ronald F. Waterman on behalf of Objectors Donald C. and JoAnn M. Marks.

1. Objection: That the Applicants have not made a valid showing to establish their water right. Response: The Department in granting a Change Application is not adjudicating the water rights involved. Condition No. 2 of the Proposed and Final Orders addresses this problem. The ownership dispute regarding the above water right was settled by the parties involved as far as the Department's jurisdiction is concerned.

2. Objection: That the Proposed Order does not specify that the Applicant must get a lease each year to use the Objector's ditch. Response: The Department has no

jurisdiction over the use of private ditches. By granting the above Change Application the Department is not granting the Applicant the right to use the Objectors' ditch; that is a matter which must be resolved by the parties involved.

FINAL ORDER

1. Application for Change of Appropriation Water Right No. 26325-c411 by John H. and Janice M. Hunter is hereby granted to change the following right as follows: CLAIMED WATER RIGHT: From a decree dated September 24, 1940, in Broadwater County consolidating case numbers 1918 and 1931; a 25 miner's inch portion of a 200 miner's inch right decreed to: J. A. Graveley, with a priority date of May 1, 1905.

PROPOSED CHANGES: AMOUNT: 280.5 gallons per minute (25 miner's inches) up to 72 acre-feet; DIVERSION POINT: SE1/4 NW1/4 SW1/4 of Section 16, Township 9 North, Range 2 East, M.P.M., Broadwater County; USE: 280.5 gallons per minute up to 72 acre-feet from April 1 to November 1 for irrigation.

2. The approval of this change is not to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, M.C.A.

NOTICE

The Hearing Examiner's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 9th day of January 19 80.

David L. Pengelly

DAVID L. PENGELLY, D.N.E.&C.
HEARING EXAMINER

AFFIDAVIT OF SERVICE
(Final Order)

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

Gale Greer, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says: That, on 1-9-, 19 80, he deposited in the United States mail, a "certified" copy of the Final Order by the Administrator, Water Resources Division, on the application by John H. & Janice M. Hunter, Application No. 26325-c41I, for a permit to appropriate water, addressed to each of the following persons or agencies:

Certified Nos. 1526 to 1530

1. John H. & Janice M. Hunter; RR #1; Box 91; Townsend, MT 59644
2. Graveley LD Ranch; RR#1, Box 93; Townsend, MT 59644
3. Donald C. & JoAnn M. Marks; Hidden Valley Ranch; Townsend, MT 59644
4. John T. Flynn; Atty. at Law; Box 96; Townsend, MT 59644
5. Ron Waterman; Atty. at Law; P.O. Box 1686; Helena, MT 59601
6. David L. Pengelly; Hearing Examiner; D.N.R.&C.; Helena, MT 59601 (hand deliver)
7. Greg Van Voast; Water Right Analysy; D.N.R.&C.; Helena, MT 59601 (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by *[Signature]*

STATE OF MONTANA)
) ss.
County of Lewis and Clark)

On this 9th day of January, 1980, before me, a Notary Public in and for said State, personally appeared Gale Greer, known to me to be the Hearing Recorder, of the department that executed this instrument or the persons who executed the instrument on behalf of said department, and acknowledged to me that such department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Beth Lamborn
Notary Public for the State of Montana

Residing at Helena

My commission expires 6 Oct 1982

CASE # 26325

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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| IN THE MATTER OF APPLICATION FOR |) | |
| CHANGE OF APPROPRIATION WATER RIGHT NO. |) | PROPOSAL FOR DECISION |
| 26325-c41I BY JOHN H. & JANICE M. HUNTER |) | |

* * * * *

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on November 17, 1980, at Helena, Montana, for the purpose of hearing objections to Application for Change of Appropriation Water Right No. 26325-c41I, David Pengelly, Hearing Examiner, presiding.

The Applicants, John H. and Janice M. Hunter, were present at the hearing. The Applicants were represented by legal counsel, John T. Flynn, Townsend, Montana. One (1) Exhibit was introduced on behalf of the Applicants:

Applicants' Exhibit

A-1 Copy of lease agreement between the Applicants and Objectors, Donald C. and JoAnn M. Marks, for use of an irrigation ditch.

The Applicants' exhibit was introduced into the record with no objections.

Two (2) Objectors, Donald C. and JoAnn M. Marks, and the Graveley LD Ranch, were represented at the hearing. Mr. and Mrs. Marks were represented by legal counsel, Mr. Ron

Waterman, Helena, Montana. The Graveley LD Ranch was represented by legal counsel, Mr. Charles Graveley, Helena, Montana. No exhibits were introduced on behalf of the Objectors.

Montana Department of Natural Resources and Conservation personnel present at the hearing were Mr. T. J. Reynolds, Helena Water Rights Bureau Area Office Supervisor, Mr. Greg Van Voast, Water Rights Analyst; and Miss Gale Greer, Hearings Reporter. The Department was not represented by legal counsel; no exhibits were introduced on behalf of the Department.

SUMMARY OF RECORD

1. On January 25, 1980, the Department received Application for Change of Appropriation Water Right No. 26325-c411 by John H. and Janice M. Hunter to change a portion of the following right: From a decree dated September 24, 1940, in Broadwater County consolidating case numbers 1918 and 1931, DECREED TO: J. A. Graveley with a priority date of May 1, 1905. PAST USE OF WATER: SOURCE: Confederate Creek; AMOUNT OF WATER APPROPRIATED: 50 miner's inches portion of 200 miner's inch right; DIVERSION POINT: W1/2 W1/2 Section 16, Township 9 North, Range 2 East, M.P.M., Broadwater County; PERIOD OF DIVERSION: April 1 to November 1; USE: 562.5 gallons per minute up to 90 acre-feet from April 1 to November 1 for irrigation; PLACE OF USE: SE1/4

SE1/4 of Section 17, Township 9 North, Range 2 East, M.P.M., Broadwater County, for irrigation on 34 acres; DIVERSION MEANS: existing ditch. PROPOSED CHANGES: Amount: 320 gallons per minute up to 72 acre-feet per annum; Diversion Points: SW1/4 NW1/4 SW1/4 of Section 16, Township 9 North, Range 2 East, M.P.M., Broadwater County; USE: 320 gallons per minute up to 72 acre-feet from April 1 to November 1 for irrigation. This change application is to change the point of diversion of the above claimed water right and for no other reason.

2. On March 27, April 3 and 10, 1980 the Department caused to be duly published in the Townsend Star, Townsend, Montana, Notice of Change of Appropriation Water Right No. 26325-c41I.

3. The Department received an objection to the above Application from the Graveley LD Ranch dated May 8, 1980.

4. On May 13, 1980 the Department received an objection to the above Application from Donald C. and JoAnn M. Marks.

5. On November 5, 1980, a pre-hearing conference was held on the above Application in Helena, Montana.

MOTIONS AND OBJECTIONS

For the record, Mr. Ron Waterman made a continuing objection to the agreement reached by the Applicants and the

Objector, Graveley LD Ranch, that each would claim only one half or 25 inches of the 50 inch portion which was, at the time of the Application, claimed by both parties.

PROPOSED FINDINGS OF FACT

Based on the transcript of the hearing and the information contained in the Department's file in this matter, it is found:

1. That the Applicants are claiming a right to 25 miner's inches rather than 50 miner's inches as stated in the original Application.

2. That 25 miner's inches is equal to 280.5 gallons per minute which is less than the 320 gallons per minute requested to be diverted under this Change Application.

3. That the actual point of diversion to be used under this Change Application is located in the SE1/4 NW1/4 SW1/4 of Section 16, Township 9 North, Range 2 East, M.P.M. In the Application the point of diversion was listed as the SW1/4 NW1/4 SW1/4 of said Section 16.

4. That the Applicant must obtain an easement to use the point of diversion and ditch to deliver the water as listed in the Application. Such easement must be obtained each year that the Applicant wishes to use water under this permit.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-402, M.C.A., 1979, states in part that "An appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this section and approved by the department. The department shall approve the proposed change if it determines the proposed change will not adversely affect the rights of other person."

2. It is concluded that the proposed change in point of diversion requested under this Application will not adversely affect the rights of other persons.

Based on the proposed findings of fact and proposed conclusions of law, the following proposed order is hereby made:

PROPOSED ORDER

1. Application for Change of Appropriation Water Right No. 26325-c41I by John H. and Janice M. Hunter is hereby granted to change the following right as follows: CLAIMED WATER RIGHT: From a decree dated September 24, 1940, in Broadwater County consolidating case numbers 1918 and 1931; a 25 miner's inch portion of a 200 miner's inch right decreed to: J. A. Graveley, with a priority date of May 1, 1905.

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2. The approval of this change is not to be construed as recognition by the Department of the water rights involved. All rights are subject to possible modification under the proceedings pursuant to Title 85, Chapter 2, Part 2, M.C.A.

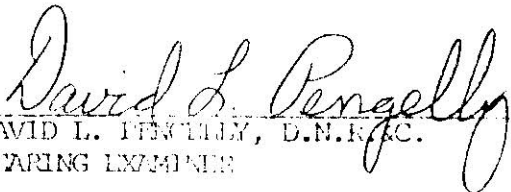
NOTICE

This Proposed Order is offered for the review and comment of all parties of record. The review and comment period shall commence with the service of this Proposed Order and shall end ten (10) days thereafter. No extensions of time for comment will be granted.

The Final Order in this matter will be sent to all parties by certified mail.

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 11th day of December, 1980.


DAVID L. PENZELY, D.N.R.C.
HEARING EXAMINER

CASE # 26325